

MOTION FILED
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No. 82-1075

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

**CPG PRODUCTS CORP. and GENERAL MILLS
FUN GROUP, INC.,**

Petitioners,

v.

ANTI-MONOPOLY, INC.,

Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

and

**BRIEF OF AMICUS CURIAE THE PROCTER &
GAMBLE COMPANY IN SUPPORT OF A PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

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The Procter & Gamble Company respectfully moves pursuant to Rule 42 of the Rules of the Supreme Court of the United States for leave to file the attached Brief Amicus Curiae in this case.

The written consent of the petitioners accompanies this Motion and Brief Amicus Curiae. The consent of the respondent was requested but refused.

The basis for the motion is the potential adverse effect of the Ninth Circuit's holding in this case on the rights of trademark owners, and The Procter & Gamble Company's interest in the outcome results from the fact that it

markets a number of consumer, industrial and institutional products under various trademarks. Moreover, one of its trademarks, TIDE, was brought into this proceeding when the petitioners introduced a survey concerning it in order to show the fallaciousness of the respondent's motivation survey and is discussed in the decision. *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1326 (9th Cir. 1982).

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INTEREST OF THE AMICUS CURIAE

The Ninth Circuit's holding in this case could have a profound adverse effect on the rights of trademark owners, and The Procter & Gamble Company's interest in the outcome results from the fact that it markets a number of consumer, industrial and institutional products under various trademarks. Moreover, one of its trademarks, TIDE, was brought into this proceeding when the petitioners introduced a survey concerning it in order to show the fallaciousness of the respondent's motivation survey and is discussed in the decision. *Anti-Monopoly*,

Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316, 1326 (9th Cir. 1982).

SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit reversed the findings of the district court as clearly erroneous and held that the MONOPOLY trademark is no longer valid because it has become the common descriptive or "generic" name of the product in question, a real estate trading board game. *Id.*

In so doing, the court relied importantly on a "motivation" survey commissioned by the respondent which had been rejected by the district court. The survey was based on the following test which the court of appeals had formulated in the first appeal in this case:

It may be that when a customer enters a game store and asks for MONOPOLY, he means "I would like Parker Brothers' version of a real estate trading game, because I like Parker Brothers' products. Thus, I am not interested in board games made by Anti-Monopoly, or anyone other than Parker Brothers." On the other hand, the consumer may mean: "I want a 'Monopoly' game. Don't bother showing me Anti-Monopoly, or EASY MONEY, or backgammon. I am interested in playing the game of Monopoly. I don't much care who makes it."

In the first example, the consumer differentiates between MONOPOLY and other games according to source-particular criteria. In the second example, source is not a consideration *Anti-Monopoly, Inc. v. General Mills Fun Group et al.*, 611 F.2d 296, 305-06 (9th Cir. 1979).¹

¹ In the respondent's survey, these statements were paraphrased to read "I would like Parker Brothers' 'Monopoly' game primarily be-

This test would set a new standard for determining the validity of a trademark. That is, if purchasers are not primarily motivated by knowledge of *and* regard for the product's producer, the trademark may be held to have become the generic name of the product itself on those grounds alone.

Such a standard is completely in conflict with the definition of a trademark in the United States Trademark Act of 1946 (popularly known as the "Lanham Act"), long accepted principles of trademark law as reflected in prior decisions of the appellate courts, including the Ninth Circuit itself, and the realities of modern marketing.

ARGUMENT

I. UNITED STATES TRADEMARK ACT OF 1946 (The "Lanham Act")

This Act defines a trademark as "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his *goods* and distinguish them from those manufactured or sold by others." 15 U.S.C. § 1127 (emphasis added). Notably missing from this definition is a requirement that the manufacturer or merchant in question be identified as such; accordingly, whether or not a trademark does so is inconsequential.

cause I like Parker Brothers' products" and "I want a 'Monopoly' game primarily because I am interested in playing 'Monopoly,' I don't much care who makes it." People who said they had bought the game or intended to do so were asked which of the two statements best expressed their reasons. Thirty-two percent chose the former; sixty-five percent the latter. *Anti-Monopoly, Inc.*, 684 F.2d at 1324.

While a trademark may, in fact, identify its owner, that it does not do so does not, in and of itself, preclude it from being a valid trademark:

One type of mark may make the customer think immediately of a particular business organization. E.g., GENERAL ELECTRIC, Du PONT, SONY, GENERAL MOTORS. Here the consumer judges quality from his knowledge of that organization's products. Another type of mark identifies a product source *without the customer necessarily thinking or caring about the business organization which is the source.* E.g., CHEER, OXYDOL, TIDE, GLEEM, CREST are all marks of products of Procter & Gamble.

However, the "identification" function of marks does not mean that the consumer must know the identity of the manufacturer or distributor of the goods. Seeing the same mark on goods merely identifies to the buyer the fact that all such goods come from a common, *even though anonymous, source* 1 J. McCarthy, *Trademarks and Unfair Competition* § 3:2 (D) (1973) (emphasis added)

Compare the Lanham Act definition with the test formulated by the Ninth Circuit. The plain meaning of the statute is not simply ignored by this test, it is turned on its ear. Not only must the identity of the manufacturer or merchant now be known from the mark itself, but that knowledge must be the primary motivating factor in making the purchase. Thus, a mark may be in jeopardy even if it actually identifies the product's producer as such should purchasers "not much care who makes it."

II. PRIOR DECISIONS

The distinction between requiring a trademark to identify and distinguish the goods and requiring it to identify the trademark owner (other than as an "anonymous source") has been clearly recognized by the courts. As stated by the Ninth Circuit itself in *Fleischmann Distilling Corp. v. Maier Brewing Company*, 314 F.2d 149, 155-56 (1963), cert. denied 374 U.S. 830 (1963) :

"Of course there may not be one in a hundred buyers of this whiskey who knows that it is made by Bachanan or wholesaled by Fleischmann. Probably all that such buyers know is that Black & White Scotch whiskey has satisfied them in the past or that they have heard of it and the average purchaser would no doubt select for the use of his guests something with which he was familiar and thus purchase Black & White Whiskey

"In Stork Restaurant v. Sahati, 9 Cir., 166 F.2d 348, 359, this court had occasion to comment upon the fact that the ordinary purchaser has only general impressions with respect to an original product or its name. He probably does not know the name of the maker who owns the trademark" (Emphasis added).

This doctrine, which has found expression in numerous decisions in other circuits,² is the antithesis of the format

² E.g., *Feathercombs, Inc. v. Solo Products Corporation*, 306 F.2d 251, 255 (2d Cir. 1962), cert. denied 371 U.S. 910 (1962), ("Although a valid trademark must serve as an indication of origin, we are not to be construed as saying that it is necessary that purchasers actually know the name of the manufacturer of the goods they purchase."); *Tas-T-Nut Company v. Variety Nut & Date Company*, 245 F.2d 3, 7 (6th Cir. 1957), ("To prove secondary meaning in a trade dress, it was not necessary to show that the public knew the personal identity of the appellant."); *Walter Baker & Co. Limited v. Slack*, 130

now prescribed by the Ninth Circuit. Inherent in the statement "I would like Parker Brothers' 'Monopoly' game primarily because I like Parker Brothers' products," which the Ninth Circuit indicates must reflect the reason why the game in question is purchased in order for MONOPOLY to be upheld as a valid trademark, is the requirement that the maker of the product be known.

III. THE REALITIES OF MODERN MARKETING

It is true that "(I)n the early development of trademark law, trademarks were thought to represent to the customer *only* the physical source or origin of the product . . . in connection with which the mark was used." 1 J. McCarthy, *Trademarks and Unfair Competition*, § 3:3 (A) (1973) (emphasis added).³

This view was the result of the then existing situation in the marketplace:

From the English Middle Ages up to the American Nineteenth Century, and even beyond, most businesses were local in nature. Consumers knew the tradesmen with whom they dealt, and they were familiar with the locations, employees and reputations of many of the manufacturers of the products they

F. 514, 518 (7th Cir. 1904), ("We may safely take it for granted that not one in a thousand knowing of or deciding to purchase 'Baker's Cocoa' or 'Baker's Chocolate' know of Walter Baker & Co., Limited"). See also *Dan Robbins & Associates, Inc. v. Questor Corporation*, 599 F.2d 1009, 1014 (C.C.P.A. 1979), ("It is enough that purchasers can rely on a mark to distinguish products emanating from different sources, and a mark need not identify a specific source.")

³ Even under that theory, the court of appeals test would be of questionable value since it is directed at determining whether the knowledge of the physical source is the motivating factor in making the purchase and not at whether the trademark indicates the source.

purchased. Indeed, there was rarely an opportunity to purchase a product made by someone other than a local artisan or manufacturer. . . . 1 J. Gilson, *Trademark Protection and Practice*, § 1.03 (1) (1974).

But the world changed, resulting in a change in the judicial view of the function and purpose of trademarks:

However, the Industrial Revolution and the Twentieth Century explosions of population, communications, transportation and technology placed the consumer at a substantial distance from the manufacturer. The consumer no longer knew about the manufacturer, which might have its offices, production facilities and employees on the other side of the world. He also became confronted by a proliferation of competing products made by these distant manufacturers. He found, however, that if he purchased a trademarked product from far away and was satisfied with its quality, he could rely on the trademark in future purchases to obtain the same level of quality. Gradually, the courts and commentators came to recognize that many consumers were indifferent to or even totally unaware of the identity of the manufacturer of the goods bearing the trademark.

Considerable momentum reflecting this attitude came in 1927 from Frank Schechter in his article "The Rational Basis of Trademark Protection." Schechter argued cogently that the "origin or ownership" rationale was obsolete because the public had come to rely on the trademark primarily as representing a satisfactory level of product quality emanating from a common, though anonymous, source. Other trademark authorities concurred generally. . . . 1 J. Gilson, *Trademark Protection and Practice*, § 1.03 (1) (1974).

The historical change to this modern view is expressed in *Family Circle, Inc. v. Family Circle Associates, Inc. et al*, 332 F.2d 534, 539 (3d Cir. 1964):

Accordingly, in the early sixteenth century, a trademark was indicative either of the origin or ownership of the goods to which it was affixed and today the problem posed is to what extent does that trademark function as to either? As a matter of fact, as has been pointed out by the very courts that define trademarks in terms of ownership or origin, that owing to the ramifications of modern trade and international distribution of goods from the manufacturer to the jobber or importer and retailer to the consumer, *the source or origin of the goods bearing a well-known trademark is seldom known to the consumer.* (Emphasis added).

The Ninth Circuit's misconception of the purpose and function of a trademark in today's market environment is clearly illustrated in its discussion of the motivation survey introduced by the petitioners, which utilized the TIDE trademark of the amicus curiae. In that survey, 68% of those who said they would buy TIDE laundry detergent, when asked whether this was primarily because they like Procter & Gamble's products or primarily because they like TIDE detergent, indicated that latter reason. The court "suspect(ed) that these results tend to show that the general public regards 'Tide' as the name of a particular detergent, having particular qualities, *rather than* as one producer's brand name for the same detergent which is available from a variety of sources." *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d at 1326 (emphasis added).

These are not conflicting, mutually exclusive alternatives, as the Ninth Circuit apparently believes. Rather, both describe what a trademark properly does and is supposed to do:

"In general, a trademark functions and is accorded legal protection because it:

- (a) designates the source or origin of a particular product or service, even though the source is to the consumer anonymous;
- (b) denotes a particular standard of quality which is embodied in the product or service;
- (c) identifies a product or service and distinguishes it from the products or services of others;
- (d) symbolizes the good will of its owner and motivates consumers to purchase the trademarked product or service;
- (e) represents a substantial advertising investment and is treated as a species of property; or
- (f) protects the public from confusion and deception, insures that consumers are able to purchase the products and services they want, and enables the courts to fashion a standard of acceptable business conduct." 1 J. Gilson, *Trademark Protection and Practice*, § 1.03 (1974).⁴

⁴ See also 1 J. McCarthy, *Trademarks and Unfair Competition*, § 3:1 (B) (1973).

CONCLUSION

The fact that the MONOPOLY trademark identifies a unique game which is made by only one manufacturer has led the Ninth Circuit to conclude that MONOPOLY cannot, for that reason, identify the game in question and distinguish it from games made or sold by others. But, arguably, each successful product has some sort of uniqueness in comparison with products directly competitive to it — the reason, it seems fair to speculate, why that product is purchased.

Additionally, the test formulated by the court of appeals does not remotely address the key issue: how the trademark is perceived by the public. As stated by Judge Learned Hand in *Bayer Co., Inc. v. United Drug Co.*, 272 F. 505, 509, (S.D.N.Y. 1921) :

The single question, as I view it, in all these cases, is merely one of fact: What do the buyers understand by the word for whose use the parties are contending? . . . So here the question is whether the buyers merely understood the word "Aspirin" meant this kind of drug, or whether it meant that and more than that: i.e., that it came from the same single, though, if one please anonymous, source from which they had got it before.

The Ninth Circuit's test has the potential for causing havoc to the trademark system. Under this test, it is inconsequential whether the trademark fulfills the statutory definition, whether the trademark indicates the source, anonymous or otherwise, or whether the trademark is perceived by the public to be such and not a generic term. If the purchaser is not motivated by a fondness for the product's producer, the trademark may be lost.

For the protection of the public which relies on trademarks as an indicia of product quality as well as of the trademark owners who have expended time, effort and money in developing their brands, The Procter & Gamble Company respectfully submits that the Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be granted.

January 21, 1983

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